88-1865

No. _____

Supreme Court, U.S.
FILED
MAY 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

STATE OF ARIZONA,

Petitioner,

vs.

GARY M. BAUER, and
YOCO ENTERPRISES, INC.,
d.b.a. Castle Adult Bookstore,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

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86 pp

QUESTION PRESENTED

FOR REVIEW

Whether the First Amendment prohibits a state criminal court from making the surrender or forfeiture of business permits and licenses a condition of probation for an individual and a corporation convicted of felony obscenity violations, pursuant to a general state sentencing provision that provides for forfeiture or revocation of any state or local permit or license upon conviction of any felony.

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No. _____

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STATE OF ARIZONA,

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GARY M. BAUER, and
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

PETITION

The State of Arizona, by and through its Attorney General, hereby petitions this Honorable Court to issue a writ of certiorari to the Court of Appeals of the State of Arizona, Division One, to review its decision of December 13, 1988.

The Court of Appeals reversed, on First Amendment grounds, the criminal trial court's forfeiture of business permits and licenses from an individual and a corporation as part of their sentence following conviction for felony obscenity violations. The Supreme Court of Arizona declined review, making this Court the final forum to save the general remedy of post-conviction license forfeiture in obscenity cases.

This federal issue of whether the First Amendment prohibits the states from revoking permits and licenses from persons convicted of felony obscenity offenses is vitally important to effective enforcement of state criminal obscenity laws and deserves the attention of this Court. It is respectfully urged that this Petition be granted and the decision of the Arizona Court of Appeals be reversed.

OPINION BELOW

The decision of the Court of Appeals of the State of Arizona, Division One, Department C, for which review is sought is reported as:

STATE of Arizona v. Gary M. BAUER and Yoco Enterprises, Inc.,
____ Ariz. ____,
23 Ariz. Adv. Rep. 56,
768 P.2d 175
(Ariz. App. 1988)
(Copy in Appendix A.)

JURISDICTION

The decision of the Court of Appeals of Arizona was filed on December 13, 1988. The State filed a Petition for Review, January 3, 1989, in the Supreme Court of Arizona, seeking review of the single issue of whether the Court of Appeals erred in reversing the trial court's

condition of probation ordering surrender of Defendants' licenses and permits. On March 14, 1989, the Arizona Supreme Court denied the Petition for Review, No. CR-89-0015-PR. The Court of Appeals then issued its Order and Mandate on March 17, 1989, making its decision of December 13, 1988, final and remanded the case to the Superior Court for Maricopa County for modification of the conditions of probation. (Copies of the orders of the Arizona Supreme Court and Court of Appeals are reproduced in Appendix B.)

This Court has jurisdiction to review the decision of the Arizona Court of Appeals, pursuant to 28 U.S.C.§ 1257. This Petition is timely filed, pursuant to Rule 20 of this Court, as being within 60 days of the denial of review by the Arizona Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Amendment 1

Congress shall make no law . . . abridging the freedom of speech, or of the press. . .

Arizona Criminal Code

The criminal code subsection which the Arizona Court of Appeals reviewed and held unconstitutional as applied in this case is Subsection 13-603(G) of the Arizona Revised Statutes (A.R.S.). Section 13-603 is entitled: "Authorized disposition of offenders". It is found in Chapter 6, "Classification of Offenses and Authorized Dispositions of Offenders", which deals with sentencings for all crimes in Title 13. A.R.S. § 13-603 was enacted in 1977, became effective in 1978, and was amended without changing this subsection, except

to re-number it from § 13-603(F) to § 13-603(G). The full text of A.R.S. § 13-603 is attached as Appendix C. As described and set out by the court below, in State v. Bauer, ____ Ariz. ____, 23 Ariz. Adv. Rep. 56, 65 n.2, 768 P.2d 175, 180 n.2 (Ariz. App. 1988), the subsection involved is as follows:

> 2. At the time of trial the statute was § 13-603(F), but it has now been renumbered to § 13-603(G). A.R.S. § 13-603(G) (Supp. 1987) provides:
>
> > If a person or an enterprise is convicted of any felony, the court may, in addition to any other sentence authorized by law, order the forfeiture, suspension or revocation of any charter, license, permit or prior approval granted to such person or an enterprise by any department or agency of the state or of any political subdivision.

STATEMENT OF THE CASE

Defendants-Respondents Gary M. Bauer and Yoco Enterprises, Inc., d.b.a. Castle Adult Bookstore in Phoenix, Arizona, were indicted by the Maricopa County Grand Jury of class 6 felony charges under A.R.S. § 13-3502. (The Indictment is Item 1 of the Record on Appeal.) (The Arizona felony obscenity statute is reproduced in Appendix D.)

A retrial in Maricopa County Superior Court commenced on April 6, 1987, upon the charged counts relating to two films rented and possessed for sale or rental in March and April of 1985 by these Defendants at the Castle Adult Bookstore.

At trial, Phoenix Police Detective Al Shearer testified that he rented the video-film "Devine Atrocities" from Defendant Bauer on April 1, 1985, and seized a copy of the film, plus related business documents, on April 9, 1985, pursuant to a Superior Court search

warrant. (See Reporter's Transcript (R.T.) of April 7, 1987, at 84-88, 93-104). At trial, both films were played to the jury in their entirety. (R.T. of Apr. 8, 1987, at 23; R.T. of Apr. 9, 1987, at 3.) The State presented expert testimony on obscenity. (R.T. of Apr. 8, 1987, at 3-80; R.T. of Apr. 8, 1987, at 4-78.) The defense presented expert testimony on non-obscenity. (R.T. of Apr. 13, 1987, at 16-149; R.T. of Apr. 14, 1987, at 4-177.)

The Castle Adult Bookstore was described and admitted to be a place where exclusively sexual materials were offered for sale, rental, and viewing, including video films, magazines, and sexual devices, all of an explicit nature. (R.T. of Apr. 7, 1987, at 54, 65, 123; R.T. of Apr. 8, 1987, at 4-15.) The film "Divine Atrocities" is a

hard-core pornographic film explicitly showing sexual penetration of various forms; oral, vaginal, anal, both hetero- and homo-sexual, and in the context of sado-masochism and rape. (R.T. of Apr. 7, 1987, at 24-29, 36, 108.)

The verdict of the jury was not guilty on Count II relating to the film "Loose Ends" and guilty of two offenses each for Defendants Bauer and Yoco Enterprises, Inc., on Counts III and IV relating to the film "Divine Atrocities". (R.T. of Apr. 16, 1987, at 3-5.) The Court of Appeals below, in State v. Bauer, 23 Ariz. Adv. Rep. at 56-57, 768 P.2d at 176-77, summarizes this case with one inaccuracy. The Court of Appeals stated "the jury found that 'Loose Ends' was not obscene", whereas the verdict was a general "not guilty" with no special mention or finding of obscenity vel non. (R.T. of Apr. 16, 1987, at 4.)

At the sentencing hearing, the trial court accepted the verdict and found both of these Defendants guilty of two counts each and designated them as class 6 felonies. (R.T. of June 12, 1987, at 3.) The trial court then mitigated the sentence as to Defendant Bauer and placed him on probation as a first offender. (Id. at 15.) The trial court sentenced Defendant Bauer both "individually and as Yoco Enterprises, Inc." (Id. at 3, 16) and recited the conditions of probation (Id. at 16-20).

Three of the conditions of probation were recited by the trial court as follows (Id. at 18-19):

> Special Term 19 . . . "Obey the obscenity laws of the State of Arizona." . . .
>
> Special Term 20, you are not to be involved in any manner while you are on probation to this Court in the traffic, sale, or rental of sexually explicit items.

Special Term No. 21, you are to surrender all permits, licenses, grants, et cetera, in the name of Gary Bauer, Yoco Enterprises or Yoco Enterprises, doing business as the Castle Adult Bookstore.

I specifically bring your attention to your City of Phoenix's license for the running of a video center, . . . this is a video center semi-annual fee for 14 devices that was issued on June 30th, 1987, and then there is a second one, also from the City of Phoenix Finance Department, for 14 devices at $25 where you pay a semi-annual fee of $350, the one being issued to Castle Bookstore, and the other one being issued to Castle Bookstore and Gary Michael Bauer.

Also, your privilege license, issued by the City of Phoenix Finance Department, under Privilege License No. 84022339. Also your transaction privilege tax license, issued by the Arizona Department of Revenue, issued to the Castle Bookstore under license No. 07296209M, also your proprietary or patent medicine permit, issued to you directly from the Arizona State Board of Pharmacy, under Permit No. 08495. All of those groups shall be notified about the revocation of all of those permits, licenses and grants.

Special Term 21 was the only condition of probation complained of by Defendants on appeal, was the only portion of the trial court judgment reversed by the Court of Appeals, was the only point raised by the State in its Petition for Review to the Arizona Supreme Court, and is the sole issue involved in this Petition.

The federal issue of whether the First Amendment to the United States Constitution prohibits as a prior restraint the revocation or forfeiture of business licenses and permits upon conviction for felony obscenity offenses was timely raised by Defendants-Respondents below.

Immediately after the sentencing judge recited the conditions of probation, counsel for the defense objected and was permitted to argue this issue. (R.T. of

June 12, 1987, at 20-22.) The trial court agreed to stay the revocation to allow the defense to seek a stay on appeal. (Id. at 22.) The parties later agreed to stay this condition pending appeal. (See State v. Bauer, 23 Ariz. Adv. Rep. at 60, 768 P.2d at 181.) The Defendants-Appellants raised and argued this issue in assignment of error No. II at pages 10-17 of their Appellants' Opening Brief in the Court of Appeals. The State answered these arguments at pages 14-19 of its Appellee's Answering Brief in the Court of Appeals. This federal issue was properly before the Court of Appeals when it ruled, and erroneously reversed, in State v. Bauer, 23 Ariz. Adv. Rep. at 59-65, 768 P.2d at 180-88. The issue was then presented by the State's Petition for Review in the

Arizona Supreme Court, which was denied on March 14, 1989. Therefore, this Court has jurisdiction to review this judgment on writ of certiorari.

As of this date, these Defendants, Gary M. Bauer and Yoco Enterprises, Inc., remain subject to the trial court's terms of probation, except for Special Term 21 unless reversed by this Court, and the issue is still ripe for adjudication and not moot.

LAW AND ARGUMENT

Reasons for Allowing the Writ

The issue of whether a state trial court, in sentencing a person convicted of a felony, can order the forfeiture or revocation of business permits and licenses is a complicated one in the context of a felony obscenity conviction of a person whose permits and licenses relate to the operation of an "adult bookstore" selling exclusively "hard-core pornography". However, this issue is vitally important in the 46 states which have obscenity laws, and in Arizona in particular.

This issue of license revocation in conjunction with obscenity and pornography laws and zoning ordinances has also been recognized as presently important to this Court. On February 27, 1989, this Court granted certiorari review to the questions

presented by the petitions in FW/PBS, Inc., et al. v. City of Dallas, et al., No. 87-2012; M.J.R., Inc., et al. v. City of Dallas, No. 87-2051; and Calvin Berry, III, et al. v. City of Dallas, et al., No. 88-49, relating to the license revocation provisions of the Dallas zoning ordinance on Sexually Oriented Businesses. See order granting petitions at ____ U.S. ____, 103 L. Ed. 2d 578, 109 S. Ct. 1309. See also summary of petition at 57 U.S.L.W. 3064-65 (7-26-88).

In light of this Court's review of the license revocation issues in the Dallas zoning ordinance cases, Petitioner herein respectfully urges that the Court also grant the State of Arizona's Petition and review the issue of whether a general criminal law provision that any felony conviction may cause forfeiture or revocation of any state or local permits and licenses applies in obscenity cases.

The issue is squarely presented here, since the convictions in this case are for felony obscenity violations, the permits were held by these Defendants-Respondents for operating the hard-core pornography store where the offenses occurred, and the permits and licenses forfeited as part of probation involved the operation of that store. The context of an actual case and controversy upon proven facts already subject to the due process of a criminal trial further supports this case as a proper vehicle to resolve the First Amendment issue as applied (rather than hypothetically as was the case in much of the precedent relied upon by the Arizona Court of Appeals in finding such revocation a prior restraint).

The incidental impact on the possible future dissemination of protected materials of a post-conviction punishment that includes divestment of licenses and

permits by the convicted offender should be ruled constitutional in light of the holding in Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S. Ct. 3172, 92 L. Ed. 2d 568 (1986), and the decision in Fort Wayne Books, Inc. v. Indiana, 489 U.S. ____, 109 S. Ct. 916, 103 L. Ed. 2d 34 (1989). The Fort Wayne decision was not announced when the Court of Appeals issued the ruling under review in the instant case. Its impact on this issue should now be assessed by this Court.

For these reasons, the Petition should be granted and decided with the City of Dallas cases or vacated and remanded after a decision is reached in the City of Dallas cases.

Proposition of Law

The First Amendment Does Not Prohibit Post-Conviction Application of General Penalty Provisions Even When That Application Could Impact Incidentally On Sales of "Expressive Material".

In Arcara v. Cloud Books, Inc., 478 U.S. at 704-07, 106 S. Ct. at 3176-78, 92 L. Ed. 2d at 576-78, this Court rejected the argument that the closure of an "adult" bookstore, after being found to be a public nuisance as a place of prostitution, "would also impose an incidental burden upon respondents' bookselling activities".

The State of Arizona submits that once convicted of an obscenity offense, and the conviction is affirmed on appeal (and where, as here, the forfeiture order was stayed pending appeal), the person convicted is subject to having his personally held licenses and permits

revoked without offending the First Amendment. Indeed, the effect on these Defendants of the license forfeiture is practically indistinguishable from the effect of Special Term 20 of the probation condition, from which Defendants did not object or appeal.

Arcara distinguished the closure of a bookstore after an adjudication concerning non-protected conduct from the prior restraints involved in Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931); United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968); and Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983).

We start with the proposition that once material is properly found obscene, it no longer has First Amendment protection. Paris Adult Theatre I v. Slaton, 413 U.S.

49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973). Therefore, the Defendants-Respondents below, once the film "Divine Atrocities" was found obscene, were no longer subject to First Amendment protection for the acts convicted for. When these Defendants are thereafter removed from the commercial business they then held permits or licenses for, this removal only affects these Defendants for these business activities and only incidentally affects the selling of the books and films that might be present at the store. These materials could be liquidated to another merchant, since they were not seized or restrained by the probation order, and the business property could be sold or converted to another use for which these Defendants could apply for new licenses or permits. Whether these Defendants are forbidden from continuing any business

activities for which they held permits or licenses at the time of conviction would not affect the ability of other persons to sell the items remaining in this store. The revocation of Defendants' licenses does not include closure of the store. The trial court below did not order that any action be taken against the store or any materials within the store. The condition was only that Mr. Bauer and Yoco Enterprises, Inc., surrender their present permits and licenses to do business at that location.

The difference from Near v. Minnesota, noted in Arcara, 478 U.S. at 705 n.2, is analogous here, in that (1) the probation order here "would imposed no restraint at all on the dissemination of particular materials" (as was the concern of the assumed injunctive power to enjoin unnamed future films in Vance v. Universal Amusement Co., 445 U.S. 308,

100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980)), since these Defendants-Respondents are free to apply for new permits or licenses to carry on other businesses elsewhere, and (2) the license forfeiture was not imposed "on the basis of an advance determination that the distribution of particular materials is prohibited", since it was imposed after conviction and after the First Amendment's presumptive protection was removed from the film involved. This case is analogous to forbidding the editor of a newspaper from working at that paper after a conviction for violating a criminal law while acting as editor of that paper. It is not the same as closing the newspaper as was attempted in Near.

Even if strict scrutiny is applied to analyze a situation where "it was conduct with a significant expressive element

that drew the legal remedy in the first place, as in O'Brien" (Arcara, 478 U.S. at 706), the license forfeiture here would pass that scrutiny for the reasons mentioned above. The instant case also fails to offend Arcara, at 706-07, as "a statute based on a nonexpressive activity [that] has the inevitable effect of singling out those engaged in expressive activity, as in Minneapolis Star", since A.R.S. § 13-603(G) applies to all felons who hold any state or local permits and has the same effect on these Defendants' acts as if they were incarcerated or had the property forfeited which was used in the offense.

In Fort Wayne Books, Inc. v. Indiana, 489 U.S. ____, 103 S. Ct. at 927-29, 103 L. Ed. 2d at 51-54, this Court distinguished unlawful pre-trial seizures of inventories of books based on probable cause and inadequate procedures from

post-trial forfeitures. The question of post-trial forfeiture of property used in, or derived from, criminal activity was reserved in Fort Wayne Books, 109 S. Ct. at 928 and n.11, 103 L. Ed. 2d at 53 and n.11. The adversary hearing that is necessary for a valid seizure of more than a single allegedly obscene item is supplied in post-trial forfeitures by the trial itself. Here, the statute on sentencing only comes into force after conviction for a felony and the adversary trial always precedes any license forfeiture or revocation.

Since this Court, in Arcara and Fort Wayne Books, Inc., has clarified the application of the watershed rule of Near v. Minnesota in obscenity related cases, and since the instant probation condition license forfeitures are not in contravention to the rules of Near, Arcara, or Fort Wayne Books, Inc., the

basis for the analysis of the Arizona Court of Appeals (of the nuisance-padlock and other license forfeiture cases, State v. Bauer, 23 Ariz. Adv. Rep. at 59-65, 768 P.2d at 180-87, like those referred to by the Court in Arcara, 478 U.S. at 701, 106 S. Ct at 3174-75, 92 L. Ed. 2d at 574) is subject to a new review, and this Petition presents the opportunity to do so.

CONCLUSION

The Arizona Court of Appeals erred in treating the license forfeitures of these two Defendants as a prior restraint on the dissemination of particular expressive materials. The surrender of their licenses would affect only the ability of Mr. Bauer and Yoco Enterprises, Inc., to continue operating the Castle Adult Bookstore. Such a condition of probation is related to their felony offenses and is personal as to them. The incidental impact license forfeiture has on their First Amendment

activities is narrowly tailored to satisfy only the punishment due to them as felons. The mere fact that the Defendants were convicted of obscenity felonies, or that the licenses were related to the operation of a bookstore, do not prevent the legitimate reach of otherwise valid personal punishment.

For these reasons, and to allow a consistent result with the City of Dallas cases pending in this Court, the Petition should be granted.

Respectfully submitted,

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Appendix A

Opinion of the Court of Appeals

Opinion of

The Court of Appeals of Arizona
Division One, Department C

in

State v. Bauer,
___ Ariz. ____,
23 Ariz. Adv. Rep. 56,
768 P.2d 175
(Ariz. App. 1988)

Reprinted from:

768 P.2d 175

STATE of Arizona, Appellee,

v.

Gary M. BAUER and Yoco Enterprises, Inc., Appellants.

Nos. 1 CA–CR 11628, 1 CA–CR 11631.

Court of Appeals of Arizona,
Division 1, Department C.

Dec. 13, 1988.

Review Denied March 14, 1989.

Individual and corporation doing business as bookstore were found guilty of two counts of production, publication, sale, or possession of obscene film, individual was sentenced to three years probation, and defendants were imposed fine of $27,400 and were ordered to forfeit all permits and licenses issued to them by either State or its political subdivisions, in the Superior Court of Maricopa County, Cause No. CR–147826, Francis P. Koopman, J. pro tem., and defendants appealed. The Court of Appeals, Brooks, J., held that: (1) jury instructions defining prurient interest were constitutional; (2) statutory definition of obscenity was not unconstitutionally overbroad; (3) requiring business to surrender all permits and licenses operated as unconstitutional prior restraint in violation of business' First Amendment rights; and (4)

revocation of business' proprietary or patent medicine license permit issued by Board of Pharmacy was not unconstitutional prior restraint.

Affirmed in part, vacated and remanded with directions in part.

1. Constitutional Law ⇐90.1(6)

Motion pictures are as fully protected by the First Amendment as are other mediums of expression. U.S.C.A. Const.Amend. 1.

2. Obscenity ⇐20

Jury instruction in obscenity trial defining "prurient" was sufficient to inform jury that "prurient" meant unwholesome, morbid, degrading, or shameful interest in sex. U.S.C.A. Const.Amend. 1.

3. Obscenity ⇐20

Trial court in obscenity prosecution properly instructed jury that contemporary state standards applied only to questions of appeal to prurient interest and patent offensiveness, and not to determination whether material taken as whole lacked serious literary, artistic, political, or scientific value. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐48(1)

In interpreting statutes, courts should, if possible, give disputed statute constitutional construction and uphold statute even though it may be inartfully drawn.

5. Obscenity ⇐2.5

Lack of definition of term "prurient" in statute stating that item is obscene when average person applying contemporary state standards would find that item, taken as whole, appeals to prurient interest, did not render statute facially overbroad. A.R.S. § 13-3501, subd. 2.

6. Obscenity ⇐2.5

Obscenity statute, which does not contain a definition of "prurient," is not overbroad on its face or as interpreted in *Bartanen* which affirmed an interpretation of "prurient interest" containing words "having lustful ideas or desires" but expressly differentiating between "prurience" and an interest in sex which is candid, wholesome, and healthy. A.R.S. § 13-3501, subd. 2; U.S.C.A. Const.Amend. 1.

7. Obscenity ⇐7.5

Obscenity may be restrained prior to its dissemination, but only under certain procedures adopted by United States Supreme Court which are designed to mitigate any "chilling" effect. U.S.C.A. Const. Amend. 1.

8. Obscenity ⇐7.5

Although prior restraints of obscenity are not unconstitutional per se, they are to be strictly viewed. U.S.C.A. Const.Amend. 1.

9. Constitutional Law ⇐90.4(1)
Licenses ⇐38

Order that business surrender licenses for running video center, privilege license, and transaction privilege tax license, after business was convicted of obscenity, operated as unconstitutional prior restraint in violation of First Amendment rights. A.R.S. § 13-603, subd. G; U.S.C.A. Const. Amend. 1.

10. Constitutional Law ⇐90.4(1)
Drugs and Narcotics ⇐15

Revocation of business' proprietary or patent medicine license permit issued by Board of Pharmacy, after business was found guilty of obscenity violations, did not constitute prior restraint prohibited under First Amendment. U.S.C.A. Const.Amend. 1.

Robert K. Corbin, Atty. Gen. by William J. Schafer III, Chief Counsel, Criminal Div., Joseph T. Maziarz, Asst. Atty. Gen., Phoenix, for appellee.

Nancy L. Hinchcliffe, Phoenix, and Robert E. Smith, Universal City, California, for appellants.

OPINION

BROOKS, Judge.

Appellants Gary Bauer and Yoco Enterprises, Inc., doing business as Castle Adult Bookstore (defendants), were charged by indictment with seven counts of production, publication, sale, and possession for distribution of obscene items, all class 6 felonies. The charges stemmed from the sale or rental of four videocassette films.

The first trial ended in a mistrial, with the jury informing the trial court that it could not reach a verdict on any of the seven counts. On retrial, the prosecution

elected to proceed on only five counts in connection with two films, "Loose Ends" and "Divine Atrocities." At the conclusion of the second trial, the jury found that "Loose Ends" was not obscene and defendants were acquitted of the charges relating to that film. However, the jury found each defendant guilty of two counts of production, publication, sale, or possession of an obscene film in connection with the rental of "Divine Atrocities," in violation of A.R.S. § 13–3502 (1978) (current version in Supp.1987).

At the mitigation/sentencing hearing, the trial court found that Gary Bauer and Yoco Enterprises, Inc., were one and the same and designated all four counts, two against Bauer and two against Yoco, as class 6 felonies. After considering the mitigating circumstances, the court sentenced Bauer, individually, and on behalf of Yoco, to three years probation. As a term of probation, the court imposed a fine of $27,400 jointly upon both defendants. Further, pursuant to statute, the trial court ordered that defendants forfeit all permits and licenses issued to either of them by the State of Arizona or its political subdivisions.

Defendants timely appealed the convictions and terms of probation, challenging the constitutionality of the Arizona obscenity statutes, A.R.S. § 13–3501 *et seq.*, and related jury instructions, as well as the validity of the term of probation requiring the license forfeitures. By order of this court, these separate appeals were consolidated. We affirm the convictions but vacate the terms of probation and remand for imposition of new terms of probation.

PRELIMINARY PRINCIPLES

[1] We begin by noting that motion pictures are as fully protected by the First Amendment as are other mediums of expression. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952). However, obscenity is not within the area of constitutionally protected speech. *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957);

Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *State v. Book-Cellar, Inc.*, 139 Ariz. 525, 679 P.2d 548 (App.1984).

In *Miller*, the Supreme Court established guidelines to be used by the trier of fact when determining whether or not an item is obscene: (a) whether the average person, applying contemporary community standards, would find that the item as a whole appeals to the prurient interest; (b) whether the item depicts, in a way that is patently offensive, sexual conduct as specifically defined by state law; and (c) whether the item as a whole lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24, 93 S.Ct. at 2615, 37 L.Ed.2d at 431. Arizona Revised Statutes § 13–3501(2), which defines obscenity, adopts the *Miller* test.[1]

THE JURY INSTRUCTIONS

[2] The trial court in the instant case instructed the jury on the definition of obscenity, quoting A.R.S. § 13–3501(2) verbatim:

> An item is obscene when (A) the average person applying contemporary state standards would find that the item, taken as a whole, appeals to the prurient interest; and (B) the item depicts or describes, in a patently offensive way, sex-

1. The statute has been recently amended to reflect current refinements in this area of law. *See* Laws, 1986, Ch. 411, § 1. These changes do not affect our analysis.

ual activity as that term is described herein; and (C) the item taken as a whole lacks serious literary, artistic, political or scientific value.

The trial court also instructed the jury on the definition of "prurient interest" as follows:

> The term "appeal to the prurient interest" means an appeal to an unhealthy, unwholesome, morbid, degrading or shameful interest in sex or nudity. An interest in sex is normal. But if the material appeals to an abnormal interest in sex, it can appeal to the prurient interest. A prurient interest in sex is not the same as a candid wholesome or healthy interest in sex. Material does not appeal

> to the prurient interest just because it deals with sex or shows nude bodies. Prurient interest is an unhealthy, unwholesome, morbid, degrading or shameful interest in sex, a leering or longing interest. An appeal to the prurient interest is an appeal to sexual desire, not an appeal to sexual interest. An interest in sex is normal, but if the material appeals to an abnormal interest in sex, it can appeal to a prurient interest.

Defendants contend that the trial court improperly instructed the jury on the definition of "prurient interest." They argue that "prurient interest" cannot encompass "lust" or carry any connotation of a normal, healthy interest in sex. In order to pass constitutional muster, they argue, "prurient interest" must be confined to terms of an "abnormal, unhealthy, unwholesome, morbid, degrading, or shameful" interest in sex.

We recognize the rule of law that "prurient interest" must not include sexual interests that are "healthy, wholesome, human reaction[s] common to millions of well-adjusted persons in our society." *J–R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 490 (9th Cir.1984), *rev'd on other grounds sub nom. Brockett v. Spokane Arcades*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). Contrary to defendants' argument, there is no mention of the words "lust" or "lustful desires" in the instruction. In fact, the trial court specifically refused to use the term "lust" after a request to do so by the state. We conclude that, when read as whole, the instruction is sufficient to inform the jury that "prurient" means an unwholesome, morbid, degrading, or shameful interest in sex. *See State v. Bartanen*, 121 Ariz. 454, 591 P.2d 546, *cert. denied*, 444 U.S. 884, 100 S.Ct. 174, 62 L.Ed.2d 113 (1979).

[3] Defendants next argue that the trial court's instruction on the third prong of the *Miller* test, whether the item lacks serious literary, artistic, political, or scientific value, was improper in light of the United States Supreme Court's recent decision in *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987). We find no error.

In *Pope*, the jury was instructed that in determining whether the material was obscene, it had to apply "contemporary community standards" to all three prongs of the *Miller* test. However, the Supreme Court held that the proper inquiry with respect to the third part of the *Miller* test is "not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in the alleged obscene material, but whether a *reasonable person* would find such value in the material, taken as a whole." *Id.* 481 U.S. at 500–501, 107 S.Ct. at 1921, 95 L.Ed. 2d at 445 (emphasis added).

In the instant case, the record reveals nothing which would suggest that the trial court improperly instructed the jury that the third part of the *Miller* test for obscenity must be judged by reference to community standards. To the contrary, the trial court specifically instructed the jury that contemporary state standards applied only to the questions of appeal to prurient interest and patent offensiveness, the first two

parts of the *Miller* test. When the court instructed the jury on the third part, it stated:

> Another part of the statutory test for obscenity, requires the jury to find whether material taken as a whole lacks serious literary, artistic, political, or scientific value.
>
> Though serious value or the lack of it is *not determined in terms of contemporary state standards*, evidence of catering to prurient interest in the creation, promotion, or dissemination of material is relevant in determining whether the material has any such claimed serious value.

(Emphasis added.) As noted by this court in *State v. Feld*, 155 Ariz. 88, 91 n. 1, 745 P.2d. 146, 149 n. 1 (App.1987), *cert. denied*, 485 U.S. ——, 108 S.Ct. 1270, 99 L.Ed.2d 482 (1988), the third part of the *Miller* test found in A.R.S. § 13–3501(2) must be analyzed according to the reasonable person standard articulated in *Pope*, which is entirely consistent with the language of our

statute. In fact, although *Pope* had yet to be decided, the defendants in the instant case attempted to inject into the trial court proceedings the very idea that was rejected in *Pope*.

> MR. SMITH [Counsel for defendants]: ... we would ask the court and we will give you a written instruction tomorrow morning, your Honor, for the record—
> THE COURT: Yes.
> MR. SMITH: —that will ask you to charge the concept of serious value in the light of contemporary community standards of acceptance or tolerance.

The trial court correctly declined to outguess the Supreme Court's decision in *Pope* and refused to give the instruction. We find no error as the trial court correctly applied the law.

CONSTITUTIONALITY OF THE ARIZONA OBSCENITY STATUTES

Defendants also challenge the constitutional validity of Arizona's obscenity statutes, claiming that the definition of obscenity is "unconstitutionally overbroad, both on its face and as applied." They argue that the definition includes within its reach material that appeals to a normal interest in nudity or sex. We take this to mean that defendants challenge the statutory term "prurient interest" as being overbroad on its face and as interpreted by the Arizona Supreme Court in *State v. Bartanen*, 121 Ariz. 454, 591 P.2d 546, *cert. denied*, 444 U.S. 884, 100 S.Ct. 174, 62 L.Ed.2d 113 (1979). We reject both of these contentions.

[4, 5] In interpreting statutes, courts should, if possible, give the disputed statute a constitutional construction and uphold that statute even though it may have been inartfully drawn. *See generally State v. Grijalva*, 111 Ariz. 476, 533 P.2d 533, *cert. denied*, 423 U.S. 873, 96 S.Ct. 141, 46 L.Ed.2d 104 (1975); *State v. Book-Cellar, Inc.*, 139 Ariz. at 528, 679 P.2d at 551. An overbroad statute is "one that is designed to burden or punish activities which are not constitutionally protected, but [that] includes within its scope activities which are protected by the first amendment." *Hill v. City of Houston*, 764 F.2d 1156, 1161 (5th Cir.1985), *aff'd on rehearing*, 789 F.2d 1103 (5th Cir.1986) (en banc), *aff'd*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed. 2d 398 (1987).

We first note that A.R.S. § 13–3501 does not define "prurient." It does, however, mirror the *Miller* decision. Obscenity statutes which meet the guidelines set forth in *Miller* but leave the word "prurient" undefined or defined by case law have been upheld. *See People v. Sequoia Books, Inc.*, 160 Ill.App.3d 315, 112 Ill.Dec. 54, 513 N.E.2d 468 (1987), *cert. denied*, — U.S. —, 109 S.Ct. 175, 102 L.Ed.2d 144 (1988); *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir.1981), *cert. denied sub nom. Theatres West, Inc. v. Holmes*, 455 U.S. 913, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 505 & n. 13, 105 S.Ct. 2794,

2802 & n. 13, 86 L.Ed.2d 394, 407 & n. 13 (1985). Thus, the lack of a statutory definition of "prurient" does not make the Arizona statute facially overbroad.

[6] Since the term "prurient" in Arizona has been defined in case law, rather than statute, we perceive defendants' constitutional attack not to be aimed at the lack of a statutory definition, but at the construction given the statute in *State v. Bartanen*. In *Bartanen*, our supreme court affirmed an interpretation of "prurient interest" submitted in a jury instruction which contained the words "having lustful ideas or desires." However, the court noted that the *Bartanen* jury instructions contained a detailed explanation of prurience, expressly differentiating between "prurience" and an interest in sex which is candid, wholesome, and healthy. Therefore, the court found that the instructions, read as a whole, were adequate to inform the jury that "prurient interest" was a morbid or shameful interest in sex.

The identical argument presented by defendants herein was considered and rejected in *Polykoff v. Collins*, 816 F.2d 1326 (9th Cir.1987). There, several plaintiffs sought declaratory relief and an injunction restraining the Maricopa County Attorney

from enforcing the Arizona obscenity statute against them. They alleged that it was unconstitutionally overbroad on its face because the *Bartanen* definition of "prurient interest" encompassed expression protected by the First Amendment. The district court denied relief and the Ninth Circuit affirmed, finding that the statute was neither overbroad on its face, nor as construed by the Arizona Supreme Court.

The *Polykoff* court relied on *J–R Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir.1984), *rev'd on other grounds sub nom. Brockett v. Spokane Arcades*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). In *J–R Distributors/Spokane Arcades*, the Ninth Circuit invalidated an entire Washington obscenity statute because it used "lust" to define "prurient interest." The court found that "lust" may encompass normal, healthy emotions and therefore would not be within the ambit of "prurient." On appeal, the Supreme Court held, given the court's finding as to the term "lust," that the Ninth Circuit improperly invalidated the entire statute. Partial invalidation was appropriate, the Court held, but "only insofar as the word 'lust' is to be understood as reaching protected materials." 472 U.S. at 504, 105 S.Ct. at 2802, 86 L.Ed.2d at 406. Consequently, the Court reversed and remanded the case. However, on remand the case was settled. *Polykoff*, 816 F.2d at 1336. The issue of whether the term "lust" did in fact encompass normal, healthy emotions was never

finally decided by the Ninth Circuit. Therefore, the thrust of *J–R Distributors/Spokane Arcades*, is that the term "lust" *may* encompass both protected and non-protected expression.

The *Polykoff* court used this principle in scrutinizing the *Bartanen* jury instructions. It noted that the *Bartanen* instructions included an ALI, Model Penal Code definition of "prurient" which was approved in *Roth*, 354 U.S. at 487 n. 20, 77 S.Ct. at 1310 n. 20, 1 L.Ed.2d at 1508 n. 20, and *Spokane Arcades*. It then held:

> The instructions upheld in *Bartanen* repeatedly exclude normal, wholesome, healthy sexual desires from the scope of "prurient interest." The limiting construction absent in *J–R Distributors/Spokane Arcades* [i.e., the ALI definition] is clearly present here. Therefore, we reject the contention that the "prurient interest" definition in *Bartanen* is unconstitutionally overbroad.

Polykoff, 816 F.2d at 1336–37. For the same reasons given by the Ninth Circuit in *Polykoff*, we find defendants' argument here to be without merit.

LICENSE FORFEITURE PROVISIONS

The last issue concerns the constitutionality of the license forfeiture provisions of A.R.S. § 13-603(G)[2] as applied in the context of the First Amendment. Specifically, defendants argue that special condition of probation 21, requiring them to surrender all permits and licenses, operates as an unconstitutional prior restraint in violation of their First Amendment rights.

At the mitigation/sentencing hearing, the trial court sentenced defendant Bauer to three years probation and jointly imposed upon both defendants a $27,400 fine. In addition, the court imposed special condition 21 which required defendants to surrender all "permits, licenses, grants, etc." which were issued in their names. The court specifically ordered the surrender of two City of Phoenix licenses for running a video center, a City of Phoenix privilege

2. At the time of trial the statute was § 13-603(F), but it has now been renumbered to § 13-603(G). A.R.S. § 13-603(G) (Supp.1987) provides:

> If a person or an enterprise is convicted of any felony, the court may, in addition to any other sentence authorized by law, order the forfeiture, suspension or revocation of any charter, license, permit or prior approval granted to such person or an enterprise by any department or agency of the state or of any political subdivision.

license, an Arizona Department of Revenue transaction privilege tax license, and defendants' proprietary or patent medicine license issued by the Arizona Board of Pharmacy.

Citing federal case authority, defendants argued to the trial court that such license forfeitures comprised an unconstitutional

prior restraint on their freedom of expression under the First Amendment. The trial court stated that it was merely following the statutory sentencing provisions as required by law. However, recognizing First Amendment concerns, the trial court stayed the revocation of the licenses for 60 days in order for the defendants to seek a stay of that term of probation from this court. The parties then agreed to a stay of the surrender of the licenses pending appeal and we so ordered.

Defendants continue to characterize the license forfeitures as a prior restraint in violation of their First Amendment rights. They argue that the effect of the forfeitures is to restrain them from disseminating constitutionally protected material in the future based solely on the obscenity

conviction. The state maintains that it cannot constitutionally enforce a statute *designed* to suppress protected speech absent compelling circumstances. However, the state argues that the license forfeiture provision is not designed to restrain speech, but is merely a statute of general applicability, designed to reach all offenders regardless of the underlying offense. Thus, the state contends that the defendants are simply being punished for violating the law and any restraint of speech is merely coincidental. We find the state's position unpersuasive.

The starting point for determining whether a statute acts as a prior restraint is *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). In that case, a Minnesota statute provided that publication, possession, or sale of either an "obscene" or a "malicious, scandalous and defamatory" periodical was a nuisance and could be judicially enjoined. *Id.* at 702, 51 S.Ct. at 626, 75 L.Ed. at 1360. Near published a newspaper which was found to be "malicious, scandalous and defamatory." After trial, a permanent injunction was issued enjoining him from conducting any further business under the name and title of the newspaper. The Supreme Court held that the injunction was unconstitutional.

The Court began by noting that the state has authority to enact laws which promote the health, safety, and general welfare of its people. However, this authority is not limitless. The limits of that power are to be "determined with appropriate regard to the particular subject of its exercise." *Id.* at 707, 51 S.Ct. at 628, 75 L.Ed. at 1363. For instance, the state's power is limited in the area of speech. In the context of prior restraint analysis "the court has regard to substance and not to mere matters of form," and "in accordance with familiar principles, the statute must be tested by its operation and effect." *Id.* at 708, 51 S.Ct. at 628, 75 L.Ed. at 1363–64. The Court concluded that the effect of the Minnesota nuisance abatement statute was prior restraint and held that such a restraint was contradictory to the freedoms protected by the First Amendment.

Although the Court in *Near* recognized that the prohibition against prior restraints is not absolute (exceptions include national security matters and obscenity), later Supreme Court decisions have strengthened First Amendment protections by holding that any system of prior restraint of expression comes to court with a heavy presumption of unconstitutionality. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

It is important to distinguish prior restraint from subsequent punishment. Subsequent punishment for violations of criminal obscenity laws does not prevent one

from expressing oneself; it simply provides punishment for an expression which is harmful to the public welfare. This indeed "chills" free expression to some extent, but that is outweighed by the state's interest in the welfare of its citizens. On the other hand, a prior restraint stops one from speaking at all. This goes beyond "chilling"; it "freezes" speech.[3]

[7, 8] As we have already noted, obscenity is not protected by the First Amendment and may be criminally sanctioned. It may also be restrained prior to its dissemination, but only under certain

3. *See* A. Bickel, *The Morality of Consent* 61 (1975).

procedures adopted by the Supreme Court which are designed to mitigate any "chilling" effect. *See Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Even then, however, such procedures, usually nuisance abatement proceedings, are narrowly scrutinized. In *Vance v. Universal Amusement Co.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980),

the defendant company challenged a Texas public nuisance abatement statute which allowed the trial court to enjoin the showing of a motion picture before a final adjudication of obscenity. In holding the statute unconstitutional the Court stated:

> Presumably, an exhibitor would be required to obey such an order [under the nuisance statute] pending review of its merits and would be subject to contempt proceedings even if the film is ultimately found to be nonobscene. *Such prior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any criminal prosecution.*

Id. at 316, 100 S.Ct. at 1161–62, 63 L.Ed.2d at 421 (emphasis added) (footnote omitted). It is clear, then, that although prior restraints of obscenity are not unconstitutional *per se*, they are to be strictly viewed.

[9] Several federal and state courts have addressed the First Amendment concerns presented by state laws and local ordinances which use a nuisance abatement power to control obscenity. Certain jurisdictions have attempted to abate nuisances by revoking the offenders' business licenses. *See Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (C.D.Utah 1980). Other jurisdictions utilize "padlock" laws which mandate a judicially-

ordered injunction under which authorities close the place of business and bar its owners from operating in that location for the duration of the injunction. *See City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir.), *cert. denied*, 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 290 (1986).

Whether dealing with "padlock" laws or with the question of using license forfeitures as a deterrent to obscenity, an overwhelming majority of courts have concluded that the involuntary closure of a motion picture theater or bookstore for obscenity violations is an unconstitutional prior restraint. *See, e.g., City of Paducah v. Investment Entertainment; Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497 (7th Cir.1980), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981); *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir.1980), *summarily aff'd*, 454 U.S. 1022, 102 S.Ct. 557, 70 L.Ed.2d 468 (1981); *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir.1983) (per curiam); *Pollitt v. Connick*, 596 F.Supp. 261 (E.D.La.1984); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (C.D.Utah 1980); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *State v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976). The court in *Pollitt v. Connick* summarized the cases as follows:

> These decisions establish that the first amendment permits injunctions against the future dissemination of *particular items* that have previously been judicially determined obscene, but it does *not* permit blanket injunctions against dissemination of materials not yet judicially determined obscene, regardless of the increased probability, due to the disseminator's prior track record, that the materials will actually be obscene.

596 F.Supp. at 271. A review of several of these decisions would be instructive.

In 1982, a Florida state court enjoined Gayety Theatres from showing a certain videotape which had been declared obscene. *Gayety*, 719 F.2d at 1550. Thereafter, the City of Miami revoked Gayety's business license for one year pursuant to the city code which allowed for revocation of licenses when the licensee had been permanently enjoined from disseminating material found to be obscene. The district court, in a memorandum opinion, found that the license revocation was an unconstitutional prior restraint. The Eleventh Circuit Court of Appeals, in a per curiam opinion, af-

firmed the district court's holding and adopted the memorandum opinion as its own.

> In this case, there has been a judicial determination in state court that the plaintiff violated state law by exhibiting an obscene videotape. The City of Miami has constitutionally prevented further showing of that videotape. That it can surely do, but it cannot constitutionally pierce the First Amendment shield and bar, for one year, presumptively protected expression based only on prior unprotected conduct. The line between obscenity and protected expression is dim and uncertain. Under the law, the City can no more impose such a prior restraint on the plaintiff than could it by ordinance restrain a citizen from speaking in public for one year because the citizen once uttered an obscenity in a public place.

719 F.2d at 1552.

In *Cornflower Entertainment*, several of Cornflower's employees were convicted of distributing obscene materials in violation of state and local law. Under a Salt Lake City ordinance, businesses whose employees were convicted of those crimes could have their city operating licenses re-

voked by the Board of City Commissioners. As a result of the obscenity violations, the city revoked the company's licenses for one year.

The district court struck down the city ordinance as an impermissible prior restraint on the exhibitor's freedom of expression under the First Amendment. The court held that the city ordinance license revocation scheme resulted in the complete suppression of material for a period of one year, without regard to whether such material was constitutionally protected, based solely on a past obscenity conviction. 485 F.Supp. at 785. Finding no effort on the part of the city to provide safeguards to prevent legitimate expression from being restrained, the court held that the ordinance created an unconstitutional prior restraint containing none of the conditions necessary to pass constitutional muster.

Likewise, the Supreme Court of Georgia invalidated a statute which provided for the closing down of an entire bookstore on the basis of a finding that obscene material had been sold or shown on the premises. *Sanders v. State*, 203 S.E.2d at 154. The court found that although an adult bookstore is subject to reasonable regulation under the police power of the state like any other bookstore, the "overly broad" statute created an excessive "chilling effect" upon the exercise of free expression. *Id.* at 157. Furthermore, "[o]ne obscene book on the premises of a bookstore does not make an

entire store obscene." *Id.* The closing of the store necessarily prohibited the sale of other material which may not have been obscene and was presumptively protected. Thus, the statute went too far.

In *City of Paducah v. Investment Entertainment*, the city enacted a public nuisance abatement ordinance which allowed the Board of Commissioners to rescind all licenses issued to a business which had distributed materials found to be obscene. Subsequently, police officers purchased various sexually explicit magazines and video tapes from certain businesses. Following notice to the management of these businesses, the city held public hearings, determined the purchased material to be obscene, and declared those businesses to be public nuisances. The city then sought abatement under the ordinance which contemplated the filing of a civil action to revoke the operating licenses of the businesses.

The issue presented to the court of appeals was whether Paducah could use license revocation as a tool to control obscenity. The Sixth Circuit found that the ordinance was unconstitutional since the license revocation procedure could have resulted in closing down an entire business, even though not all of the material was obscene. Therefore, the abatement procedure amounted to a prior restraint of protected speech as well as unprotected speech. The court stated:

[T]he ... use of license revocation as a weapon against obscenity goes beyond merely deterring or punishing individuals who deal in obscene material. The ordi-

nance's purpose ... is to control future expression by businesses that have been subjected to the nuisance abatement procedure. The ordinance is a prior restraint of plaintiff's freedom of expression.

791 F.2d at 470. Thus, the license revocation procedure was unconstitutional.

Recently, in *State v. Feld*, 155 Ariz. 88, 745 P.2d 146 (App.1987), *cert. denied*, 485 U.S. ——, 108 S.Ct. 1270, 99 L.Ed.2d 482 (1988), we addressed the issue of closing or reorganizing businesses involved in trafficking in obscene items under the post-conviction civil remedies of Arizona's RICO statutes.[4] The *Feld* defendants were charged with conducting an illegal enterprise through racketeering which involved the exhibition of obscene films by various combinations of individuals and corporate

4. A.R.S. § 13-2314 *et seq.* as adopted from the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. §§ 1961-68 (1964).

defendants. They challenged the constitutionality of the RICO remedies as applied to criminal obscenity prosecutions. We found that the presence of free speech concerns mandated a careful construction of the statute.

> The state's remedies against obscenity under RICO are more limited than the state's remedies against other forms of racketeering activity. These limits are required by the federal and state constitutional rights regarding freedom of speech and press. The state can no more expect to reach protected interests by means of the RICO statutes than it could by means of moral nuisance or obscenity statutes.

155 Ariz. at 98, 745 P.2d at 156.

In assessing the constitutionality of our RICO remedies within a First Amendment context, we agreed with the reasoning of the Indiana Court of Appeals in *4447 Corp. v. Goldsmith*, 479 N.E.2d 578 (Ind.App. 1985), *vacated*, 504 N.E.2d 559 (Ind.1987), *cert. granted sub nom. Fort Wayne Books, Inc. v. Indiana*, 485 U.S. ——, 108 S.Ct. 1106, 99 L.Ed.2d 268 (1988).[5] In *4447 Corp.*, the defendants were charged under

5. We found the Indiana Court of Appeals opinion "more comprehensive and persuasive than the Indiana Supreme Court's reversal...." *Feld*, 155 Ariz. at 96, 745 P.2d at 152.

Indiana RICO statutes with operating an illegal enterprise involving the dissemination of obscene materials. The Indiana statutes specifically provided for license forfeiture in addition to other civil remedies such as "padlocking" the establishment, revoking corporate charters, and forfeiting all proceeds from the distribution of the outlawed materials.

The Indiana Court of Appeals stated:

> Our foregoing analysis of the property seizure and forfeiture remedies under the prior restraint doctrine applies equally to other RICO/CRRA remedies. The state ... also seeks forfeiture of defendants' business licenses and revocation of their corporate charters. Because these licenses and charters are obviously prerequisites for the corporate defendants' continued operation, their denial or revocation works as effective a prior restraint as do the seizure and other forfeiture sanctions.
>
> Such denial or forfeiture of licenses and charters based upon the past behavior of a business in distributing obscenity has been roundly condemned as a prior restraint by other courts....
>
> These decisions are informed by the central teaching of *Near* that even the most flagrant abuses of the freedoms of speech and press do not justify the imposition of sanctions which prospectively curtail communicative activity. The corporate defendants' right to continue op-

eration of these bookstores may not be abridged on the basis of past obscenity convictions, whether by padlock order, property forfeiture, or license revocation.

492 N.E.2d at 591–92 (citations omitted).

In *Feld*, we found that certain sections of Arizona's RICO statutes were unconstitutional. Specifically we held:

> [Subsections (D)(1), (2) and (3) of A.R.S. § 13–2314] act as a prior restraint upon the sale of privileged matter, and that the effect of the restraint is to close bookstores and theaters. The sanctions

> restrict future, presumptively protected speech, rather than punishing the distribution of unprotected speech in the past.

155 Ariz. at 97, 745 P.2d at 154–55. In the instant case, we fail to see how a sanction which effectively operates to permanently close a business is not an unconstitutional prior restraint merely because such a sanction falls under the sentencing provisions of A.R.S. § 13–603(G), rather than the RICO remedies of A.R.S. § 13–2314 *et seq.*, or the Obscene Movie and Pictorial Publication Abatement Statutes under A.R.S. §§ 12–811 *et seq.*, which we strictly construed in *State v. Book-Cellar*, 139 Ariz. 525, 679 P.2d 548 (App.1984). The license

revocations here operate in the same manner as did the statutes in *Feld* and *Book-Cellar*. Namely, they foreclose the exercise of future, presumptively protected expression on the basis of a past obscenity violation. The First Amendment does not allow such an effect.

The state advances several arguments in support of license revocation as punishment for an obscenity conviction. First, it asserts, as it did in the trial court, that § 13–603(G) is not designed to suppress free expression and is therefore constitutional. It points out that the sentencing provisions of the statute are content-neutral and are designed to be applied to all offenders, regardless of the offense committed. Further, the state argues that the defendants are being punished for violating the law, and the fact that the penalty imposed affects free expression is merely an incidental result. Also, the state notes that other courts have upheld one-year closures of theaters based upon a past exhibition of obscene films. We find these arguments unpersuasive.

In support of its argument that the trial court, upon a finding of obscenity, may impose a closure or forfeiture to penalize past conduct involving the distribution of unprotected obscenity, the state cites: *State ex rel. Kidwell v. U.S. Marketing, Inc.*, 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed*, 455 U.S. 1009, 102 S.Ct. 1649, 71 L.Ed.2d 878 (1982); *State ex rel. Ewing v. "Without a Stitch"*, 37 Ohio St. 2d 95, 307 N.E.2d 911 (1974), *dismissed for*

lack of a substantial federal question sub nom. Art Theater Guild, Inc. v. Ewing, 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed.2d 82 (1975); and *State ex rel. Cahalan v. Diversified Theatrical Corp.*, 59 Mich.App. 223, 229 N.W.2d 389 (1975), *rev'd on other grounds*, 396 Mich. 244, 240 N.W.2d 460 (1976). We decline to follow these cases as they represent a minority view and are also distinguishable on their facts.

The trial court in *Kidwell*, upon finding that the defendant corporation had disseminated obscene material, imposed a one-year closure of the defendants' bookstores under Idaho's Moral Nuisance Abatement Act. Defendants challenged the closure order as an unconstitutional prior restraint. The Idaho Supreme Court found the abatement procedure to be constitutional. It ignored much of the caselaw precedent cited above, *supra*, p. ——, 768 P.2d p. 182, choosing to rely instead on the *"Without A Stitch"* and *Diversified* decisions. *See Kidwell*, 631 P.2d at 629 n. 10.

The Idaho court based its holding on the fact that the closure was temporary. Furthermore, the court noted that the defendant was not barred from conducting business, because the closure was only a forfeiture of a specific piece of property and the defendant was free to do business elsewhere. We find that the presence of those factors in *Kidwell* distinguishes that case from the one at hand.

The *Kidwell* court relied, in part, on the *Diversified* decision, which the state also relies upon here. In *Diversified* the defendant corporation was found to have violated the Michigan Public Nuisance Act by exhibiting obscene motion pictures. Pursuant to the Act, the trial court ordered a one-year closure of the theater. The Michigan Court of Appeals upheld the closure because the defendant was enjoined only from showing films in the particular building. Thus, the defendant could show films at some other location. Furthermore, the Act made provision for a "release" from the closure. Neither of those two factors is present in our case. The license revocation here is permanent and bars the defend-

ants from disseminating *any* material. Thus, *Diversified* is also inapplicable.[6]

6. We note that the Michigan Supreme Court reversed the Court of Appeals' opinion without reaching the First Amendment issues. 240 N.W.2d at 463. "We ... read [*Diversified*] as standing solely for the proposition that motion picture theatres may not be enjoined from showing obscene films under the abatement act." *State ex rel. Wayne County Prosecuting Attorney v. Levenburg*, 406 Mich. 455, 280 N.W.2d 810, 811 (1979).

Finally, both *Kidwell* and the state in the instant case rely upon *State ex rel. Ewing v. "Without a Stitch"*. In that case, the Ohio Supreme Court ruled that closure provisions of its nuisance abatement statutes (which were similar to those in Idaho), comprised a constitutionally permissible method of controlling obscenity. Although the United States Supreme Court has yet to rule on these types of "padlock" laws, the *Kidwell* court reasoned, as does the state here, that the Supreme Court's dismissal of *"Without a Stitch"* for lack of a substantial federal question constituted a ruling on the merits which implicitly approved of nuisance closure provisions. *Kidwell*, 631 P.2d at 628. However, *"Without a Stitch,"* whether or not implicitly approved by the Supreme Court, provides little aid to the state.

The Ohio court in *"Without a Stitch"* narrowly construed the closure provision. It noted that a release was available and that the nuisance was only the showing of the particular movie which had been declared obscene. Thus, under the court's decision, the effect of the closure was not great since the theater could show other films not determined to be obscene. *"Without a Stitch"*, 307 N.E.2d at 917–18; *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (noting that the Ohio court in *"Without a Stitch"* narrowly construed the Ohio statute to avoid prior restraint problems). Again, this case is not helpful to the state.

No such construction of § 13–603(G) is possible. It operates to bar the defendants from *all* future dissemination by revoking their licenses to do business.

We find *Kidwell*, *Diversified* and "*Without a Stitch*" contrary to both the Arizona and majority view and clearly distinguishable from the *license* forfeiture cases. In "padlock" or *property* forfeiture cases, the opportunity remains for an exhibitor or bookstore owner to reopen at another location if that person so chooses. However, if a purveyor of sexually explicit materials must forfeit business operating licenses as part of the penalty, such a revocation operates to preclude that person from selling or exhibiting protected, non-obscene material in the future. Unlike the "padlock" cases, he could not simply move next door and reopen for business.

The state's argument that § 13–603(G) is merely a statute of general applicability and therefore any effect upon defendant's First Amendment rights is incidental is equally unpersuasive. The state argues that attorneys, doctors, realtors and others could have their licenses or permits revoked as a result of a felony conviction. This misses the point. There is an extra dimension to the case before us. The presence of First Amendment concerns requires that we carefully consider the effect of the statute as it has been applied. *Near*, 283 U.S. at 708, 51 S.Ct. at 628, 75

L.Ed. at 1363–64 (statute must be tested by operation and effect). That effect is to bar the defendant from any future business of selling protected materials because of one obscenity conviction.

In support of its argument that statutes of general applicability apply regardless of First Amendment implications, the state cites: *United States v. Pryba*, 674 F.Supp. 1504 (E.D.Va.1987); *Polykoff v. Collins*, 816 F.2d 1326 (9th Cir.1987); and *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986). Again, we find these cases inapplicable.

The decision rendered by the Ninth Circuit in *Polykoff v. Collins* is inapposite to the state's position. As we have noted, *Polykoff* upheld our supreme court's interpretation of "prurient interest" and the constitutionality of the Arizona obscenity statutes following a challenge based upon vagueness and overbreadth. In addition, the Ninth Circuit upheld Arizona's felony

fine provisions, holding that Arizona sentencing guidelines "insure that the fines will be used for deterrent purposes and not for suppressive purposes." *Polykoff*, 816 F.2d at 1338.

Presumably, the state's argument is that the license revocations, like felony fines, are a deterrent and therefore only incidentally suppressive. Yet, the license revocations are more than a deterrent, they are a prior restraint upon the sale of privileged material. It is true, and the *Polykoff* court found, that fines have some chilling effect. However, this effect is permissible since it is a subsequent punishment and not a prior restraint. Further, the fines do not bar defendants from operating their business and are not overly broad, but narrowly support the state's legitimate deterrent goal. The license revocations at issue are not analogous to a fine.

Furthermore, we find that *United States v. Pryba* supports both our decision in *State v. Feld* and the Ninth Circuit's reasoning in *Polykoff*. In *Pryba*, owners and operators of video stores were criminally indicted for disseminating obscene materials with accompanying criminal forfeiture provisions under the federal RICO statutes. Unlike the prosecution in *Feld*, however, the prosecutors in *Pryba* did not seek to reorganize or dissolve the existing businesses; rather, they sought to enforce the statutory provisions allowing the forfeiture of property and proceeds directly linked to the commission of the crime. Thus, the *Pryba* court, noting that RICO provisions like those struck down in *Feld* (post-conviction civil remedies) were not at issue, found

a nexus between the violation of the federal obscenity laws and the forfeiture of the interest or proceeds used in the commission of that crime. Mindful of potential First Amendment ramifications, the *Pryba* court stated:

> The forfeiture remedy, *properly construed* and *applied* does not impermissibly restrain further dissemination of speech, but rather simply requires those engaged in racketeering to disgorge their ill-gotten gains.

674 F.Supp. at 1516 (emphasis added). Based upon that principle, the court found that the criminal forfeiture provisions were analogous to fines and were subsequent punishments which have been consistently upheld. This holding has no application to our case.

Finally, the state relies on *Arcara v. Cloud Books, Inc.* to support the license revocation order. The issue in *Arcara* was whether the First Amendment precluded New York State from closing an adult bookstore found to be a place of prostitution. The Supreme Court held that no First Amendment rights were implicated by enforcement of a public health regulation of general application against premises upon which books happen to be sold. 478 U.S. at 707, 106 S.Ct. at 3178, 92 L.Ed.2d at 578. In reaching that conclusion, the court noted:

> The closure order sought in this case differs from a prior restraint in two sig-

nificant respects. First, the order would impose no restraint at all on the dissemination of particular materials since respondent is free to carry on his bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

478 U.S. at 705–06 n. 2, 106 S.Ct. at 3177 n. 2, 92 L.Ed.2d at 577 n. 2. Clearly, *Arcara* has no application to the case before us.

CONCLUSION

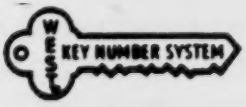
We hold that the revocation of defendants' essential operating permits and license to disseminate materials which fall within the ambit of the First Amendment acts as an unlawful prior restraint.

[10] However, we note that under special condition of probation 21, in addition to the other transaction privilege licenses, the trial court also revoked defendants' "proprietary or patent medicine license permit" issued by the Board of Pharmacy. The

revocation of this patent medicine license creates no prior restraint on the defendants' ability to continue to disseminate material which is protected under the First Amendment. Rather, such a revocation comprises a permissible penalty constitutionally imposed upon the defendants as punishment for their illegal conduct. Whatever chilling effect such a revocation may have is legitimate, intended, and immune from attack on the grounds that it is a prior restraint.

We affirm the convictions but vacate the terms of probation and remand this matter to the trial court with directions that the court impose conditions of probation in a manner consistent with this opinion.

SHELLEY, P.J., and GRANT, V.C.J., concur.



Appendix B

Orders of

The Supreme Court

and

The Court of Appeals

of Arizona

following the

Petition for Review

Supreme Court

STATE OF ARIZONA

201 WEST WING STATE CAPITOL
1700 WEST WASHINGTON
PHOENIX ARIZONA 85007 2866

TELEPHONE 602 542 4536

March 15, 1989

RE: **STATE OF ARIZONA vs. GARY M. BAUER and YOCO ENTERPRISES, INC.**
Supreme Court No. CR-89-0015-PR
Court of Appeals No. 1 CA-CR 11631
& 1 CA-CR 11628 (Consolidated)
Maricopa County No. CR-147826

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 14, 1989, in regard to the above-referenced cause:

ORDERED: **Petition for Review = DENIED.**

Justice Moeller was not present and did not participate in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix, this 15th day of March, 1989.

NOEL K. DESSAINT, Clerk

IN THE

Court of Appeals

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,

Appellee,

v.

GARY M. BAUER and YOCO ENTERPRISES,

Appellants.

1 CA-CR 11628
1 CA-CR 11631
(Consolidated)

DEPARTMENT C

MARICOPA County
Superior Court
No. CR-147826

ORDER and MANDATE

The opinion of this Court in the above matter was filed on December 13, 1988.

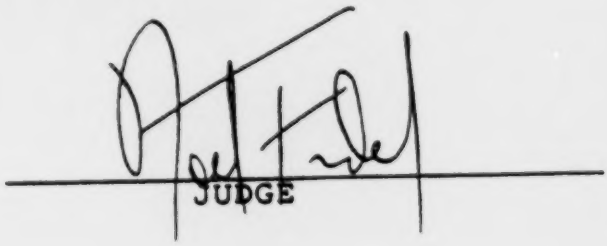
A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order dated March 14, 1989, the Arizona Supreme Court denied the petition for review, Supreme Court No. Cr-89-0015-PR.

IT IS ORDERED in conformity with the opinion attached hereto.

IT IS FURTHER ORDERED that a certified copy of the foregoing ORDER and MANDATE and a copy of the opinion of the Court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona, on March 17, 1989. A copy of the ORDER and MANDATE and a copy of the opinion was mailed to the Honorable Francis P. Koopman, Judge, and a copy of the ORDER and MANDATE was mailed on said day to each party appearing or the attorneys of record; as well as the MARICOPA County Attorney.

IT IS FURTHER ORDERED pursuant to this Court's order of the 11th day of March, 1965, that the Clerk of this Court return to the Clerk of the Superior Court all records, exhibits and other matters received from said Clerk by this Court in aid of the consideration of this matter.

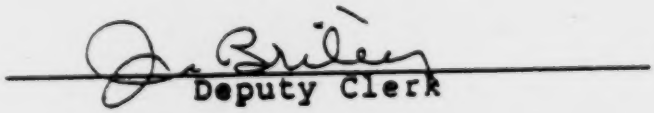
DATED March 17, 1989.



JUDGE

All of the foregoing directives were complied with March 17, 1989.

GLEN D. CLARK, Clerk
By



Deputy Clerk

Appendix C

Section 13-603

of

Arizona Revised Statutes

relating to

sentencing for felonies

§ 13-603. Authorized disposition of offenders

A. Every person convicted of any offense defined in this title or defined outside this title shall be sentenced in accordance with this chapter and chapters 7, 8 and 9 of this title[1] unless otherwise provided by law.

B. If a person is convicted of an offense, the court, if authorized by chapter 9 of this title or title 12, chapter 2, article 9,[2] may suspend the imposition or execution of sentence and grant such person a period of probation except as otherwise provided by law. The sentence is tentative to the extent that it may be altered or revoked in accordance with chapter 9 of this title, but for all other purposes it is a final judgment of conviction.

C. If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime or to the immediate family of the victim if the victim has died, in the full amount of the economic loss as determined by the court and in the manner as determined by the court pursuant to chapter 8 of this title. Restitution ordered pursuant to this subsection shall be paid to the clerk of the court for disbursement to the victim.

D. If the court imposes probation it may also impose a fine as authorized by chapter 8 of this title.

E. If a person is convicted of an offense and not granted a period of probation, or when probation is revoked, the following sentences may be imposed:

1. A term of imprisonment authorized by this chapter or chapter 7 of this title; or

2. A fine authorized by chapter 8 of this title. The sentence is tentative to the extent it may be modified or revoked in accordance with chapter 8 of this title, but for all other purposes it is a final judgment of conviction. If the conviction is of a class 2, 3 or 4 felony, the sentence cannot consist solely of a fine; or

3. Both imprisonment and a fine; or

4. Intensive probation, subject to the provisions of title 12, chapter 2, article 9; or

5. Intensive probation subject to the provisions of title 12, chapter 2, article 9, and a fine; or

6. A new term of probation or intensive probation.

F. If an enterprise is convicted of any offense, a fine may be imposed as authorized by chapter 8 of this title.

G. If a person or an enterprise is convicted of any felony, the court may, in addition to any other sentence authorized by law, order the forfeiture, suspension or revocation of any charter, license, permit or prior approval granted to such person or an enterprise by any department or agency of the state or of any political subdivision.

H. A court authorized to pass sentence upon a person convicted of any offense defined within or without this title shall have a duty to determine and impose the punishment prescribed for such offense.

Amended by Laws 1983, Ch. 123, § 1; Laws 1984, 1st S.S., Ch. 11, § 2, eff. July 1, 1985; Laws 1984, Ch. 123, § 1, eff. Aug. 3, 1984, and § 2, eff. July 1, 1985; Laws 1984, Ch. 124, § 1, eff. Aug. 3, 1984, and § 2, eff. July 1, 1985; Laws 1986, Ch. 248, § 2.

[1] Sections 13-701 et seq., 13-801 et seq., and 13-901 et seq.

[2] Section 13-901 et seq. or 12-291 et seq.

Appendix D

Sections 13-3501 and 13-3502

of

Arizona Revised Statutes

relating to

definitions and elements of

felony obscenity offenses

CHAPTER 35.—OBSCENITY

Section
13–3509. Duty to report; classification.
13–3510. Evidence of obscenity.
13–3511. Exemption; broadcasts and telecasts.
13–3512. Obscene or indecent telephone communications to minors for commercial purposes; violation; classification.

United States Supreme Court

Proof beyond reasonable doubt. Not required in obscenity case, see California ex rel. Cooper v. Mitchell Bros.' Santa Anna Theater (1981) 102 S.Ct. 172, 454 U.S. 90, 70 L.Ed.2d 262, rehearing denied 102 S.Ct. 1779, 456 U.S. 920, 72 L.Ed.2d 181 on remand 180 Cal.Rptr. 728, 128 C.A.3d 937, certiorari denied 103 S.Ct. 259, 459 U.S. 944, 74 L.Ed.2d 202, rehearing denied 103 S.Ct. 581, 459 U.S. 1093, 74 L.Ed.2d 940, rehearing denied 104 S.Ct. 33, 463 U.S. 1237, 77 L.Ed.2d 1453.

§ 13–3501. Definitions

In this chapter, unless the context otherwise requires:

1. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual activity, sexual conduct, sexual excitement, or sadomasochistic abuse, when both:

(a) To the average adult applying contemporary state standards with respect to what is suitable for minors, it both:

(i) Appeals to the prurient interest, when taken as a whole. In order for an item as a whole to be found or intended to have an appeal to the prurient interest, it is not necessary that the item be successful in arousing or exciting any particular form of prurient interest either in the hypothetical average person, in a member of its intended and probable recipient group or in the trier of fact.

(ii) Portrays the description or representation in a patently offensive way.

(b) Taken as a whole does not have serious literary, artistic, political, or scientific value for minors.

2. "Item" means any material or performance which depicts or describes sexual activity and includes any book, leaflet, pamphlet, magazine, booklet, picture, drawing, photograph, film, negative, slide, motion picture, figure, object, article, novelty device, recording, transcription, live or recorded telephone message or other similar items whether tangible or intangible and including any performance, exhibition, transmission or dissemination of any of the above. An item also includes a live performance or exhibition which depicts sexual activity to the public or an audience of one or more persons. An item is obscene within the meaning of this chapter when all of the following apply:

(a) The average person, applying contemporary state standards, would find that the item, taken as a whole, appeals to the prurient interest. In order for an item as a whole to be found or intended to have an appeal to the prurient interest, it is not necessary that the item be successful in arousing or exciting any particular form of prurient interest either in the hypothetical average person, in a member of its intended and probable recipient group or in the trier of fact.

(b) The average person, applying contemporary state standards, would find that the item depicts or describes, in a patently offensive way, sexual activity as that term is described in this section.

(c) The item, taken as a whole, lacks serious literary, artistic, political or scientific value.

3. "Knowledge of the character" means having general knowledge or awareness, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of that which is reasonably susceptible to examination by the defendant both:

(a) That the item contains, depicts or describes nudity, sexual activity, sexual conduct, sexual excitement or sadomasochistic abuse, whichever is applicable, whether or not there is actual knowledge of the specific contents thereof. This knowledge can be proven by direct or circumstantial evidence, or both.

(b) If relevant to a prosecution for violating § 13-3506 or 13-3507, the age of the minor, provided that an honest mistake shall constitute an excuse from liability under this chapter if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

4. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

5. "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed, for the purpose or in the context of sexual gratification or abuse.

6. "Sexual activity" means:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.

7. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast.

8. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

9. "Ultimate sexual acts" means sexual intercourse, vaginal or anal, fellatio, cunnilingus, bestiality or sodomy. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of consummation of ultimate sexual acts.

Amended by Laws 1986, Ch. 411, § 1.

§ 13-3502. Production, publication, sale, possession and presentation of obscene items; classification

A person is guilty of a class 5 felony who, with knowledge of the character of the item involved, knowingly:

1. Prints, copies, manufactures, prepares, produces, or reproduces any obscene item for purposes of sale or commercial distribution.

2. Publishes, sells, rents, lends, transports or transmits in intrastate commerce, imports, sends or causes to be sent into this state for sale or commercial distribution or commercially distributes or exhibits any obscene item, or offers to do any such things.

3. Has in his possession with intent to sell, rent, lend, transport, or commercially distribute any obscene item.

4. Presents or participates in presenting the live, recorded or exhibited performance of any obscene item to the public or an audience for consideration or commercial purpose.

Amended by Laws 1986, Ch. 411, § 2.

CERTIFICATE OF SERVICE

Three copies of the foregoing Petition for a Writ of Certiorari were served upon counsel for Defendants-Respondents on this 13th day of May, 1989, by placing them in the U.S. Mail, first-class postage prepaid, addressed to the following:

ROBERT EUGENE SMITH, ESQ.
10 Universal City Plaza
Suite 1650
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(818) 509-7270

AND

NANCY L. HINCHCLIFFE, ESQ.
101 South Central Avenue
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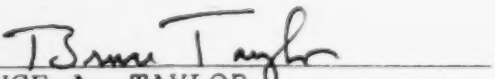
Phoenix, Arizona 85004
(602) 252-3200

Attorneys for Respondents

All parties required to be served have been served.



BRUCE A. TAYLOR
Counsel of Record for
Petitioner

No. 88-1865

In The

Supreme Court of the United States

October Term, 1988

STATE OF ARIZONA,

Petitioner,

vs.

GARY M. BAUER, and
YOCO ENTERPRISES, INC.,
d.b.a. Castle Adult Bookstore,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC. IN SUPPORT OF PETITIONER STATE OF ARIZONA

PEGGY M. COLEMAN
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107 Parkgate Drive
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(601) 844-5036

Counsel of Record
For Amicus Curiae

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Ariz. Rev. Stat. Ann.	§13-603	4, 5
	§13-701	4

INTEREST OF AMICUS CURIAE

American Family Association, Inc. (AFA), has received consent of the parties to the filing of this Brief Amicus Curiae. Consent of Petitioner, State of Arizona, was received from its attorney, Bruce A. Taylor, Esq, Assistant Attorney General, and of Respondents, Gary Bauer and Yoco Enterprises, Inc., from their attorney, Robert Eugene Smith, Esq.

AMERICAN FAMILY ASSOCIATION'S INTEREST

The American Family Association, Inc. is a nonprofit organization incorporated in 1977 under its original name of National Federation for Decency, Inc. AFA continues to operate as a leader of citizen and church participation to promote traditional

American family values and apply the Biblical ethic in society. As Amicus, AFA has members in all 50 states; has over 500 chapters of local citizens who are active in seeking to preserve community integrity through elimination of the harmful effects of sexually oriented businesses; and has over 380,000 individuals and churches who are subscribers to its monthly newsletter, AFA Journal.

AFA is constantly asked by local governments and law enforcement officers for advice and guidance on methods of enforcing obscenity laws. AFA chapters actively seek to preserve the integrity of their local communities. The effective enforcement of obscenity laws and the imposition of available punishment are methods which are used by local chapters.

The ability of AFA to continue to call for the enforcement of such laws is contingent upon a finding that a state may impose sanctions upon convicted obscenity violators as it would other convicted criminals. Amicus, and the citizens it represents, would be severely harmed if the decision of the Arizona Court of Appeals is permitted to stand. Consequently, AFA will support the position of the State of Arizona regarding the constitutionality of the imposition of the license forfeiture punishment.

LAW AND ARGUMENT

THE ARIZONA COURT OF APPEALS ERRED IN DECLARING THE APPLICATION OF THE GENERAL ARIZONA LICENSE FORFEITURE PROVISION AN UNCONSTITUTIONAL PRIOR RESTRAINT AS APPLIED IN AN OBSCENITY CONVICTION

The Arizona Court of Appeals misconstrued the application of a general criminal penalty statute in declaring that it constituted a prior restraint. State v Bauer, 768 P.2d 175 (Ariz. App. 1988). Under the Arizona obscenity statute, defendant Bauer, when found guilty of a class 6 felony faced one and one-half years imprisonment. Ariz. Rev. Stat. Ann. §13-701.

The trial court was authorized to order the business license forfeiture pursuant to Ariz. Rev. Stat. Ann. §13-603. This section provides, in part:

> G. If a person or an enterprise is convicted of any

> felony, the court may, in addition to any other sentence authorized by law, order the forfeiture, suspension or revocation of any charter, license, permit or prior approval granted to such person or an enterprise by any department or agency of the state or of any political subdivision.

The imposition of the punishment under §13-603 does not constitute a prior restraint in that it does not prohibit an individual from engaging in speech activities. The provision merely requires the forfeiture of various business licenses. There is no prohibition which would prevent the individual from applying for another license to carry on the business.

The defendant was subject to imprisonment of one and one-half years upon conviction of the obscenity offense. Such punishment would have clearly "chilled" his First Amendment rights, but such punishment is well

within recognized constitutional limits. See, Near v Minnesota, 283 U.S. 697, 708 (1931); Polykoff v Collins, 816 F.2d 1326, 1337 (9th Cir. 1987). The conditional probation afforded the defendant greater expressive avenues than if the general statutory imprisonment provisions had been imposed.

In its decision the Court of Appeals stated:

> It is important to distinguish prior restraint from subsequent punishment. Subsequent punishment for violations of criminal obscenity laws does not prevent one from expressing oneself; it simply provides punishment for an expression which is harmful to the public welfare. This indeed "chills" free expression to some extent, but that is outweighed by the state's interest in the welfare of its citizens. On the other hand, a prior restraint stops one from speaking at all. This goes beyond "chilling"; it "freezes" speech.

State v Bauer, 768 P.2d 175, 181 (Ariz. App. 1989).

A punishment should be designed to deter the individual from engaging in the criminal activities. In discussing the question of prior restraint in the context of the federal racketeering law, the court in United States v Pryba, 674 F.Supp. 1504, 1512 (E.D. Va. 1987), stated:

> The flaw in this argument is the recognized distinction between prior restraints and subsequent punishment. The evil of a prior restraint is that speech is suppressed before its status is judicially determined. Such restraints are far more likely to chill, indeed to suppress, free speech than subsequent punishment, which can be imposed only after there is the procedural safeguard of a disinterested judicial determination concerning the alleged illegality. A person is punished for speech-related conduct only after he is given the opportunity to litigate, inter alia, the constitutionality of the statute, either facially or as applied to him. In obscenity cases, he is also permitted to present the material to a jury and attempt to persuade it, under Miller, that the material

> deserves constitutional protection. Prior restraints deprive "speakers" of these important safeguards. ***.

The Pryba court went on to discuss the reasonableness of RICO as a punishment for obscenity crimes.

> This is not to say that subsequent punishment schemes such as RICO's forfeiture scheme have no chilling effect whatever. Surely it has some, indeed it is designed to accomplish just that end. But this "chilling" is a wholly legitimate consequence of the RICO forfeiture provisions or any other criminal penalty. Deterrence (or chilling) through the threat of prosecution and punishment is a legitimate goal of the criminal law. Once it is decided that obscenity does not merit First Amendment protection and indeed, once it is decided that obscenity is so pernicious that it should be criminally prosecuted, then a subsequent punishment, like RICO's forfeiture scheme, is a sensible and wholly legitimate law enforcement weapon.

674 F.Supp. at 1512-13.

The license forfeiture provision is a legitimate punishment and places considerably fewer limitations upon

speech than does the federal RICO statute. It is also less restrictive than the RICO forfeiture provision upheld by this Court in Fort Wayne Books, Inc. v Indiana, 489 U.S. ____, 109 S.Ct. 916, 103 L.Ed. 2d 34 (1989).

Instead of imposing a punishment that would severely restrict Bauer's ability to engage in speech activities, the trial court placed Bauer on probation with several conditions. Three of these conditions are significant in the instant case:

> Special Term 19 . . . "Obey the obscenity laws of the State of Arizona."
>
> Special Term 20, "You are not to be involved in any manner while you are on probation to this Court in the traffic, sale, or rental of sexually explicit items."
>
> Special Term 21, "You are to surrender all permits, licenses, grants, et cetera, in the name of Gary Bauer, Yoco Enterprises or Yoco Enterprises doing

business as the Castle Adult Bookstore."

State v Bauer, Reporter's Transcript of June 12, 1987, at 18-19.

The penalties Bauer faced were applicable to any convicted criminal and are content-neutral. This penalty is similar to that upheld by this Court in Arcara v Cloud Books, Inc., 478 U.S. 697 (1986). In Arcara the Court found that the general statutory sanctions for nuisance violations did not constitute a prior restraint when applied to a business which sold sexually oriented material. This Court concluded:

> It is true that the closure order in this case would require respondents to move their bookselling business to another location. Yet we have not traditionally subjected every criminal and civil sanction imposed through legal process to "least restrictive means" scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subjected to sanction. Rather, we have subjected such restrictions to scrutiny only

> where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in O'Brien, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in Minneapolis Star.

418 U. S. at 706-07.

Under the Arizona statutory scheme like that in New York in Arcara, all violators are affected equally by the sanctions. Individuals or businesses convicted of obscenity violations are not selected for special application of this punishment provision. The Fort Wayne Court stated that "deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination

of material not obscene.' Smith v California, 361 U.S. 147, 154-155 (1959). Cf. also Arcara v Cloud Books, Inc., 478 U.S. 697, 706 (1986). The mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents." 109 S.Ct. at 930.

The license forfeiture provision allows anyone convicted of an obscenity violation the opportunity to continue to speak. The only limitation is that he may not do so under currently-held government-granted licenses. This punishment clearly does not serve as a prior restraint.

The application of the Court of Appeals conclusions and rationale to the punishment of obscenity law violators would create a separate subclass of

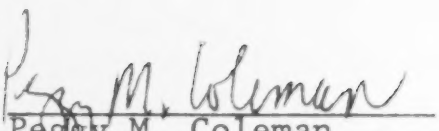
criminal offenders. This interpretation first renders meaningless the legislature's intent that obscenity violators be treated as other criminals. Secondly, it unnecessarily subjects general criminal punishments to a scrutiny that has never been required by this Court, See, Arcara v Cloud Books, Inc., 478 U.S. 697 (1986), Fort Wayne Books, Inc. v Indiana, 109 S.Ct. 916 (1989).

Consequently, the Court of Appeals' decision is an attempt to rewrite the criminal punishment statute and to thwart the will of the people of the state of Arizona.

CONCLUSION

For the foregoing reason, this court should grant the Petition for Certiorari submitted by the State of Arizona.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief Amicus Curiae of American Family Association, Inc., have been mailed this eighth day of June, 1989, to the following counsel of record:

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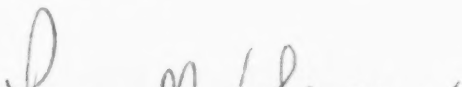

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